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No. 121, ORIGINAL

In The

Supreme Court of the United States

October Term, 1994

THE STATE OF LOUISIANA

v.

THE STATE OF MISSISSIPPI, ET AL.

JOINT RESPONSE OF MISSISSIPPI AND THE HOUSTON GROUP TO THE EXCEPTIONS OF THE STATE OF LOUISIANA

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RECORD AND PARTIES REFERENCES

The Exceptions of the State of Louisiana to the Final Report of the Special Master and Petition for New Trial of the Supplemental Hearing is referred to herein as "Exceptions" or "Louisiana's Exceptions."

The transcript of the district court proceedings before Judge Barbour is cited herein as "Tr. [page number]."

The transcript of the supplemental proceedings before the Special Master is cited herein by witness, volume, and page number. *E.g.* "[witness name], [volume number] Sup. Tr. [page number]."

Defendants/Respondents Julia Donelson Houston Erhardt, Ruth Houston Baker and Hines H. Baker, Jr., Co-Executors and Co-Trustees of the Estate of George T. Houston a/k/a George T. Houston III, deceased, and Ruth Houston Baker, individually, are collectively referred to herein as the "Houston Group."

Defendants/Respondents Mississippi and the Houston Group are collectively referred to herein as "Respondents."

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Louisiana's Exceptions make reference to collateral matters that have little to do with the controlling issues in this litigation. To bring matters into focus, it may be helpful to indicate what the parties' dispute is ***not*** about. It is not about any "new island" in the Mississippi River; that island has never been the subject of these proceedings. Furthermore, the dispute is not really about the location of the "live" thalweg – the present downstream navigation channel; the "live" thalweg is not the issue. Instead, this litigation is about the ***boundary thalweg*** and its location relative to Stack Island, referred to in these proceedings as the "Disputed Area."[1]

There is little disagreement between the parties regarding the law – the Rule of the Thalweg, the Island Rule, etc.[2] Similarly, there is no disagreement regarding the location of the boundary thalweg relative to Stack Island at the time it was patented to the Houston Group's predecessor in title. Instead, the parties' disagreement centers on whether the Disputed Area is the result of the accretionary migration of Stack Island from its location at

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[1] The Special Master coined the term "Disputed Area" for the area in question in an effort to bring uniformity of nomenclature. In this Response, Respondents use the terms "Stack Island" and "Island No. 94" to refer to the island during the time it was changing in configuration and location. The term "Disputed Area" is used to refer to Stack Island in its current location.

[2] The sole exception in this regard appears to be the newly-devised "top bank/mean high water/ordinary high water" definition that Louisiana seeks to overlay onto the Island Rule.

the time of the federal patent to its current location along the Louisiana bank.[3]

The Special Master found that the Disputed Area was, in fact, Stack Island as it changed in configuration and location as a result of the natural processes of accretion and erosion. Respondents submit that the evidence overwhelmingly compels this conclusion – the change in shape and location over the decades can be traced map to map and aerial photograph to aerial photograph. Louisiana, predictably, disagrees. Louisiana contends that sometime around 1883, between the time of the patent survey in 1881 and the patent issuance in 1888, Stack Island was completely "washed away." Louisiana's position in this regard is largely based on assumptions and extrapolations developed by its expert witnesses.

Simply stated, the pivotal issues in this litigation are (1) what happened to Stack Island after 1881 and (2) under those facts, what results follow under the Rule of the Thalweg and its Island Rule exception.

I. LOUISIANA HAS MISCONSTRUED RESPONDENTS' POSITION REGARDING THE HISTORY OF STACK ISLAND AND THE LEGAL CONSEQUENCES THAT FOLLOW THEREFROM

As a preliminary matter, it should be noted that Louisiana's treatment of Stack Island's history and of

[3] There is nothing unusual about one state's land being situated across the river and up against another state. This occurs with regard to Mississippi and Louisiana all up and down the river.

Respondents' position in that regard is inaccurate and fosters confusion. Accordingly, Respondents believe that it is important that those matters be clarified at the outset.

a. History of Stack Island

In 1888, a federal land patent for Stack Island (also known as Island No. 94) was issued to the Houston Group's predecessor in title. Under applicable law, the patent was effective as of 1881, the time of the patent survey. It is this "patented" Stack Island that is the subject of the parties' dispute and of the discussion set forth below.

All the parties are in agreement that Stack Island originally "formed"[4] as Mississippi land – with the main downstream navigation channel on the west or Louisiana side and a secondary or "chute" channel on the east or Mississippi side. Under the Rule of the Thalweg and the Island Rule, the effect of this is twofold:

1. Because the downstream navigation channel or "thalweg" lay to the west of the island, the interstate boundary ran to the west of

[4] Respondents submit that the evidence reflects that Stack Island has been in continuous existence and east of the boundary thalweg since prior to Mississippi's statehood in 1817 through the time of the patent survey in 1881 (and to the present). Louisiana contends that the "pre-1817" island washed away (this being the first of three "disappearances" urged by Louisiana), but concedes that, prior to the patent survey, Stack Island "re-formed" on the Mississippi side of the navigation thalweg.

the island and, therefore, Stack Island was Mississippi land.

2. The interstate boundary would always be located west of the island regardless of any subsequent change in the navigation channel.

See Missouri v. Kentucky, 78 U.S. (11 Wall.) 395, 397, 401 (1871); *Indiana v. Kentucky*, 136 U.S. 479, 508-09 (1890). There is no disagreement among the parties in this regard.

By 1882-83, the eastern "chute" channel had enlarged[5] and the Mississippi River Commission ("MRC") had commenced its channel control work in the vicinity of Stack Island. Ultimately, dikes were constructed along the Mississippi bank to the head of Stack Island to close the eastern channel and force the river along the west of the island toward the Louisiana bank. This channel control work is described in the MRC reports in evidence as Exhibit LA-18A.

By 1901, accretions to Stack Island had caused the island to grow substantially to the west. As a result, the island, which was approximately 117 acres at the time of the patent survey in 1881, had grown several times larger

[5] Louisiana has contended that the "chute" channel became the main downstream navigation course prior to the patent survey in August 1881. Respondents disagree, but whether the navigation course had shifted from the west to the east at that time is not relevant in this litigation. Even if it did, under the Island Rule, the boundary thalweg remained to the west of Stack Island.

by 1901. [*See* Exhibit LA-SE-11.][6] During this same time period, the river had eroded away substantial acreage along the Louisiana bank.

Between 1901 and 1913, the Mississippi River breached the dike work constructed by the MRC and reestablished a flowing channel to the east of Stack Island. By 1913, this east channel had been adopted as the main navigation channel.

From 1913 through approximately 1937, the Mississippi bank was scoured away by the river and in places was cut away by 2,600 to 3,500 feet.[7] During this same time period, the river eroded away the eastern portion of Stack Island. As a consequence, the island, which had grown to the west to a very substantial size by 1901, lost a significant amount of acreage on the east side. This is reflected on the overlay exhibits used in the proceedings before the Special Master.[8]

[6] Louisiana contends that in 1883, between the time of the 1881 patent survey and the 1901 survey referenced in the text, Stack Island had "washed away" completely (this is the second of the three such "disappearances" posited by Louisiana). Louisiana argues, therefore, that the island shown on the 1901 survey is not traceable to the Stack Island patented to the Houston Group's predecessor in title. Louisiana's claim that Stack Island "disappeared" in 1883 is addressed in detail below. It is sufficient here to note that the "disappearance" is not convincingly supported by the record evidence and was specifically rejected by the Special Master.

[7] *See* Winkley, 3 Sup. Tr. 152-59; Exhibits P-SE-50-P-19, P-SE-50-P-20, and P-SE-50-P-24.

[8] *See* Exhibits P-SE-50-P-18 through P-SE-50-20, and P-SE-50-P-24.

Between 1913 and the mid-1950's, Stack Island continued to grow to the west and to erode on the east, giving the appearance of "migration" by the island. The boundary channel to the west, now a minor channel, was in the process of silting-in. Ultimately, in approximately 1954, water ceased to flow in the boundary channel. [*See* Austin Smith testimony before Judge Barbour, Tr. 340, 396-97; Austin Smith prepared testimony, Exhibit P-PT-1 at 8; Exhibit P-30.][9]

To summarize, Stack Island commenced as Mississippi land; it grew substantially to the west through accretions (multiplying to several times its size at the time of the patent); and subsequently diminished in size by erosion on the eastern side. At no time did the island ever cease to exist as an identifiable island formation.

b. Legal effect of the foregoing facts

Respondents believe that the legal effect of the foregoing historical facts relating to Stack Island may be simply stated.

> ***First***, under the Rule of the Thalweg and the Island Rule, the boundary thalweg was established in the river channel to the west of Stack Island. As stated previously, there is no disagreement in this regard.

[9] From the mid-1950's to the present, the erosion and accretion has continued, albeit in a relatively minor scope, and Stack Island or the Disputed Area now consists of approximately 2000 acres. [*See* Exhibits P-SE-40 and P-SE-31(A)-(E).]

> ***Second***, so long as water continued to flow in the boundary channel to the west, the boundary itself remained "ambulatory" in the western channel.
>
> ***Third***, as Stack Island grew by accretions to the west and the river channel moved to the west, so did the thalweg in order to maintain the integrity of Mississippi's sovereignty over the island under the Island Rule.
>
> ***Fourth***, when water ceased to flow in the boundary channel to the west of Stack Island, the boundary became "fixed."

Respondents submit that the foregoing conclusions necessarily follow from a straightforward application of the Rule of the Thalweg and the Island Rule.

II. LOUISIANA'S CHARACTERIZATION OF THE PROCEEDINGS BEFORE THE SPECIAL MASTER IS BOTH INACCURATE AND INAPPROPRIATE

In its Exceptions, Louisiana has mischaracterized the proceedings before the Special Master in significant respects, and Respondents believe that those misstatements should be noted and corrected.[10]

[10] Section II does not purport to be an exhaustive listing of the errors in Louisiana's Exceptions but is, instead, a sample of the principal inaccuracies.

a. Louisiana's attack on the competence and integrity of the Special Master

In its Exceptions, Louisiana attacked both the competence and the integrity of the Special Master. Louisiana impugns Judge McKusick's integrity by implying that he had "prejudged" the matter adversely to Louisiana, asserting that he was intent on "forc[ing] pre-determined conclusions" and that he acted "in an obvious procrustean effort to force a pre-determined legal result."[11] The Special Master's competence is assailed by Louisiana's assertion that he was capable of assembling and organizing documents and other evidentiary material,[12] but was "overwhelmed" by the "complexities" of the case. "Unfortunately, the intricate, detailed, and sometimes subtle scientific and technical presentations proved overwhelming to an otherwise observant Special Master." [Exceptions at 14]

In truth, Louisiana's professed dissatisfaction with the Special Master has nothing to do with his competence or integrity. Rather, it finds root in the fact that he did not embrace Louisiana's arguments but, instead, saw them for what they are – hypothetical theories. With reference to Louisiana witness Brien Winkley, the Special Master stated:

> His expert opinion as to what *might* or even *should* have happened to Stack Island, however, cannot overcome what *did* happen to Stack

[11] *See* Exceptions at 6 and 24.

[12] *See* Exceptions at 2.

> Island as shown uninterruptedly by the succession of maps through the years from 1881 until beyond the time when water ceased to flow between the transformed Stack Island and the Louisiana shore. *See* Appendix D.

[Final Report at 24 (emphasis in original)]

To be sure, it is not unusual these days to see expert witnesses attempt to devise theories and explanations that favor their employer's position. However, contrary to Louisiana's protestations, this is not a complicated case; and, Louisiana's theories and assumptions would have been far from compelling to the ordinary juror, much less to someone of Judge McKusick's background and experience. The Special Master's refusal to "buy in" to Louisiana's arguments does not mean that he "ignored" them, "disregarded" them, "misunderstood" them, or had a "preconceived" mindset against them. The truth of the matter is that, after painstaking review and analysis, the Special Master simply did not find the extrapolations of Louisiana's experts to be convincing.[13]

Louisiana's attack on the Special Master is not worthy of these proceedings.

[13] Louisiana also falsely states that the Special Master simply adopted Judge Barbour's findings. As indicated in the Final Report, however, and as reflected by the manner in which the supplemental proceedings were conducted, it is clear that the Special Master reached his conclusions independently. [*See* Final Report at 17.]

b. Louisiana's misattribution of its "disappearing island" theory

At several places in its Exceptions, in an apparent attempt to give credence to its "disappearing island" theory, Louisiana attributes findings to Judge Barbour that he never made. At pages 6 and 10 of the Exceptions, Louisiana contends that, in the district court proceedings, Judge Barbour "correctly found" that Stack Island had "washed away entirely" and "disappeared." In fact, Judge Barbour never made any such finding. The reference cited by Louisiana is to that portion of Judge Barbour's opinion that stated Louisiana's position. Judge Barbour rejected Louisiana's "disappearing island" theory and made exactly the opposite finding.

> The Court does not accept the theory of the Louisiana parties. It is clear from the Louisiana exhibits themselves, LA-21, 27, and 29, that there has always been a land mass from 1881 to the present time which map by map can be traced from the original Stack Island. . . .
>
> The Court concludes by a preponderance of the evidence that the land mass which now lies against the Louisiana bank and which is the portion claimed by the Plaintiffs, is Stack Island in the sense that it is the original island as it originally existed in 1881 plus accretions less erosion. . . .
>
> . . . [T]here is no testimony whatsoever that Stack Island disappeared. The Court simply thinks that the Louisiana parties' position that Stack Island disappeared because it moved from under the location of the original Stack Island is not well taken. . . .

[No. 91-1158; Pet. for Cert. App. 32a-33a]

The notion that Stack Island "disappeared" was invented by Louisiana and, contrary to Louisiana's argument, was expressly rejected by Judge Barbour.

c. Louisiana's vacillation on the boundary issue

Louisiana has been involved in this boundary dispute for approximately eight years. During that time, Louisiana has embraced varying views of the interstate boundary in the vicinity of the Disputed Area. Prior to closing argument, the Special Master instructed the parties to clearly state their position on the boundary issue. Thereafter, Louisiana stated its contention that the interstate boundary in the vicinity of the Disputed Area was the "live" thalweg – the current downstream navigation course.

> So we believe the active channel rule is the correct rule, the rule enunciated in the 1984 case, and that the current channel line should represent the boundary between the states in this case.

[Attorney Keyser, 5 Sup. Tr. 207; *see generally* 5 Sup. Tr. 204-207] In light of Louisiana's litigation strategy and its witnesses' testimony during the supplemental proceedings, this was the only position Louisiana could take.

Previously, Louisiana had argued for a "frozen" boundary east of Stack Island in its 1881 location. However, in the proceedings before the Special Master, Louisiana had to abandon that position in order to attack the federal land patent. Accordingly, Louisiana explicitly adopted the position (1) that the "pre-statehood" Stack Island "disappeared," (2) that the Stack Island patented in 1888 had originally formed as Mississippi land after statehood, and (3) that the patented Stack Island had subsequently been "washed away" and "disappeared."

In the face of those three matters, Louisiana could not take any other position regarding the boundary. Louisiana's previous position – that the thalweg was "frozen" east of Stack Island (the Hatley Harrison boundary line) – was flatly precluded by Louisiana's concession that Stack Island formed as Mississippi land, having been "severed from the [Mississippi] landmass by sudden and avulsive acts of the river a short time before the 1881 survey."[14] If, in fact, the island was "severed" from Mississippi, as Louisiana claimed, Stack Island constituted Mississippi land.

Now, however, in its Exceptions, Louisiana appears to take both the "frozen thalweg" position and the "live thalweg" position. [*See* Louisiana's Prayer for Relief,

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[14] Louisiana's Trial Brief to the Special Master ("La. Br.") at 11. It is Respondents' position that Stack Island has continuously been in existence since prior to statehood. Regardless, however, Louisiana's admission that Stack Island formed on the Mississippi side of the boundary thalweg (whether prior to statehood or shortly before the patent) precludes any argument that the boundary was east of Stack Island at the time the island was patented. [*See* Final Report at 15.]

Exceptions at 29.] This "whipsawing" between theories is improper and undercuts any contention that Louisiana's position is "irrefutable" or "conclusive."[15]

d. Louisiana's mischaracterization of record evidence regarding the Austin Smith line

Louisiana's Exceptions completely misstate the facts with regard to the interstate boundary urged by Respondents. As stated previously, Respondents assert that the proper boundary line runs in the former river channel to the west of Stack Island, which silted-in and ceased to flow in the 1950's. However, Louisiana argues that the Respondents' boundary line "transects property owned and occupied historically by Louisiana riparians who have farmed it since just after the turn of the century." [Exceptions at 3; *see also id.* at 7.] That statement is patently and irretrievably false.

The Respondents' boundary line runs along the western edge of the Disputed Area, and the Disputed Area has never been "owned" or "occupied" or "farmed" by Louisiana riparians, much less since "the turn of the

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[15] Louisiana's vacillation regarding the boundary has not been limited to the proceedings in No. 91-1158 and this original action. In the 1970's, the Lake Providence Port Commission investigated its claim to Stack Island and determined that it had no claim to or interest in the "accretion area lying along the Louisiana shore immediately south of Stack Island." [*See* Exhibits P-83 and P-112.] During this same period of time, the Louisiana Department of Public Works, through its director Hatley Harrison, investigated Louisiana's claim to the Disputed Area but never asserted any claim. [*See* Exhibits P-80 through P-84, P-87, P-88, P-90, P-91, and P-92.]

century." Louisiana's own briefing and witnesses prove this. In its Exceptions, Louisiana itself claims that the Disputed Area did not form until the 1930's and acknowledges that it formed "in the place of eroded Louisiana riparian land." [Exceptions at 16; *see also id.* at 8.] Louisiana's witness Winkley admitted that the Louisiana bank had been dramatically cut away by the river, in places by as much as 2,500 feet. [*See* Winkley, 3 Sup. Tr. 218.][16] It is incorrect, therefore, to state the boundary line "transects property owned and occupied historically by Louisiana riparians" because, as Louisiana concedes, the property they may have farmed had long since eroded away.

In a related misstatement regarding the location of the Respondents' boundary line, Louisiana falsely states that Mississippi expert Austin Smith "admitted on cross-examination that his boundary line was between 7,000 to 8,000 feet too far to the west from the true thalweg." [Exceptions at 3] This is nothing but a word game. The so-called "true thalweg," as Louisiana calls it, is ***not*** the boundary thalweg but, instead, is the current "live" navigation course, which is not relevant under the Island Rule. Here, Louisiana is attempting to substitute what it

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[16] Finally, Louisiana totally distorts the testimony of one of Respondents' witnesses, Robert Jarvis. According to Louisiana, Robert Jarvis "does not dispute" that the Austin Smith line "transects Louisiana farmland on the river side of the Louisiana levee which was never washed away or re-built by the river"; and, per Louisiana, Jarvis "feels that since he has hunted in the general vicinity from time to time and has walked across some of these properties, he has a good claim of ownership." [Exceptions at 7] Mr. Jarvis has never said anything of the sort.

has elsewhere called a "geologic" thalweg for the boundary thalweg depicted by Austin Smith. Under the Island Rule, the boundary thalweg and current navigation course may, in fact, diverge by thousands of feet, but, as Louisiana well knows, it is only the boundary thalweg that is relevant.

Louisiana also pretends that there is no record support for Respondents' boundary line as determined by Austin Smith. In this regard, Louisiana maintains a studied silence regarding (1) the establishment of the boundary thalweg to the west of Stack Island and (2) the movement of the thalweg with the river channel in advance of the accretions building on the west side of Stack Island. Under the rule stated in *Arkansas v. Tennessee*, 246 U.S. 148 (1918), the boundary became "fixed" when water ceased to flow in the boundary channel.

> So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of these processes is at an end; the boundary then becomes fixed in the middle of the [old] channel as we have defined it, and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion. The emergence of the land, however, may or may not follow, and it ought not in reason to have any controlling effect upon the location of the boundary line in the old channel.

246 U.S. at 175. Austin Smith's testimony in this regard is set out in the transcript of the trial before Judge Barbour at pages 280-82 (generally 328-403). [*See also* Exhibit LA-

SE-147.][17] Louisiana's argument that Austin Smith's line is without evidentiary support is absolutely incorrect.

e. Louisiana's accusations regarding the "new island"

Louisiana distorts the scope of Respondents' claims in this litigation by its misleading statement that Respondents "are claiming possession, jurisdiction, and sovereignty of both the land accreted to Louisiana [the Disputed Area] and to the 'new' Stack Island near Mississippi." [Exceptions at 10-11] The fact of the matter is that this litigation involves only the Disputed Area. Contrary to Louisiana's insinuation of "treachery" – there has never been a claim to the "new" island (referred to as "Rabbit Island" at page 22 n.11 of the Final Report). Louisiana's attempt to sow confusion is improper and should be rejected.

III. A STRAIGHTFORWARD APPLICATION OF THE RULE OF THE THALWEG AND THE ISLAND RULE PLACES THE INTERSTATE BOUNDARY ALONG THE WESTERN EDGE OF THE DISPUTED AREA

It has been Respondents' position throughout that, under the Rule of the Thalweg and its Island Rule

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[17] Because in 1954 the western river channel had not been used for navigation for some time, hydrographic data was not retrieved for that year. However, Exhibit LA-SE-147 reflects hydrographic data for 1948, which confirms that Austin Smith's line was correctly placed. [*See also* Exhibits LA-SE-21 and LA-SE-22, which are 1950 and 1952 hydrographic surveys and which confirm the further "silting-in" of the boundary channel, as described by Austin Smith.]

exception, the boundary between Mississippi and Louisiana in the area in question runs along the western edge of the Disputed Area. Respondents submit that this necessarily follows from a straightforward application of the Island Rule, which holds that a boundary thalweg always remains on the same side of an island, regardless of a subsequent change in the downstream navigation course. *See Missouri v. Kentucky*, 78 U.S. at 397; *Indiana v. Kentucky*, 136 U.S. at 508-09; *Uhlorn v. United States Gypsum Co.*, 366 F.2d 211 (8th Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967); *Davis v. Anderson-Tully Co.*, 252 F. 681 (8th Cir. 1918).

In this case, it is undisputed that the boundary thalweg was west of Stack Island in its pre-patent location and, therefore, that Stack Island was Mississippi land. Accordingly, under the Island Rule, when the navigation channel shifted to the east side, the boundary remained to the west of Stack Island in order to maintain the integrity of Mississippi's sovereignty over the island. This conclusion is the central premise and inevitable result of the Island Rule.

Louisiana has devised two theories in its attempt to avoid the implications of the Island Rule. Neither theory, however, finds compelling support in the record, and both theories were carefully considered and squarely rejected by the Special Master.

a. Louisiana's "disappearing island" theory

Louisiana's first theory for avoiding the implications of the Island Rule is its "disappearing island" theory.

Louisiana contends that Stack Island "disappeared" or "washed away entirely" on three separate occasions – in 1811 (as a result of the New Madrid earthquake), in 1883 (after the patent survey), and in 1948. Accordingly, the argument goes, there simply is nothing to "trigger" the Island Rule and nothing for the boundary thalweg to "stay west of." Louisiana's "disappearing island" theory fails on the facts. Indeed, after a careful examination of the entire record, the Special Master found the conclusion "inescapable" that "Stack Island never washed away, and it is now the Disputed Area." [Final Report at 22]

1. The 1811 and 1948 "disappearances"

The 1811 "disappearance," if it did occur, is irrelevant. Even if it did occur, Louisiana has conceded that a new island subsequently formed within Mississippi and was ultimately patented to the Houston Group's predecessor in title. All the parties – Louisiana, Mississippi, and the Houston Group – agree that the Stack Island that was patented was Mississippi land with the boundary thalweg to the west. Accordingly, the 1811 "disappearance" makes no difference in the boundary determination.

Louisiana's claim of a 1948 "disappearance" is difficult to understand, but appears simply to be an exercise in misdirection. By 1948, it should be noted that Stack Island had completed its accretion to the west and was

located near the Louisiana bank. It is featured on Louisiana's own maps.[18] [*See, e.g.* Exhibits LA-23 and LA-SE-147.] Apparently, Louisiana's reference to the river bed being "scoured clean" and "swept clear" is ***not*** to Stack Island in its location as the Disputed Area but, instead, to the area occupied by Stack Island in 1881 prior to migration. [*See* Exceptions at 6; 24-25.] Louisiana's own witnesses conceded on cross-examination that, in 1948, Stack Island existed and had an elevation of five feet above "ordinary high water." [Mayeux, 4 Sup. Tr. 165-67; Winkley, 3 Sup. Tr. 166-67] Furthermore, as the Special Master noted, in its 1948 location, Stack Island had trees that in 1994 were 60 to 70 years old and, therefore, in 1948 were 14 to 24 years old. [Final Report at 21]

Louisiana's claim that Stack Island had "disappeared" by 1948 is plainly incorrect. Neither the maps nor Louisiana's witnesses support that claim. Accordingly, it should be rejected.[19]

2. The 1883 "disappearance" and the "lunch map"

The contention that Stack Island "disappeared" around 1883 became the centerpiece of Louisiana's trial strategy. Louisiana's theory in this regard rests on the

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[18] In the 46 plus years since 1948, of course, Stack Island/the Disputed Area has been subjected to additional accretion and subsequent erosion.

[19] It is clear that, in 1948, Stack Island had diminished considerably from its 1901 size. It is equally clear, however, that the island was still very much in existence with substantial stands of timber.

slender thread of a solitary document of curious origin – the "lunch map" (so named because it first came to light during the cross-examination of Louisiana witness Brien Winkley, who had been supplied with the map during the lunch break by another Louisiana witness, Michael Mayeux).

It should be remembered that the island had been surveyed in August 1881 and the patent was issued in 1888. At the time of the island's supposed "disappearance," Stephen B. Blackwell and his family were living and farming on the island. Blackwell and two others gave sworn testimony in May 1885 that Blackwell and his family had continuously lived on Stack Island from April 1882 through the date of the testimony – the precise time period during which Louisiana theorizes that Stack Island "washed away." [*See* P-SE-20; *see also* Final Report at 20-21.]

Again, the sole basis for Louisiana's position is an overly-aggressive interpretation of the lunch map (Exhibit LA-SE-159-Orig), which purports to reflect 1883 hydrographic data and to depict a steamboat sailing line close to the edge of the 1881 outline of Stack Island.

An understanding of the manner in which Louisiana uses the lunch map clearly reflects the hypothetical nature of Louisiana's position. To reach the conclusion that Stack Island had disappeared by 1883, Louisiana (1) takes the depicted sailing line, (2) selects a sailing channel width of 1500 feet, (3) assigns 750 feet of the postulated channel to the east of the sailing line, which would bring the eastern portion of the 1500 foot channel into Stack Island as it existed in 1881, and (4) concludes that

the presumed erosion of part of the island means that the entire island was obliterated. The foregoing string of assumptions is the basis for Louisiana's claim that Stack Island "disappeared" in 1883.

Louisiana's treatment of the lunch map is mere hypothesis and conjecture. Louisiana's conclusion is flatly precluded by actual recorded facts, not the least of which is the fact of the Blackwell family's continuous residence on the island from April 1882 through May 1885, as sworn to by numerous witnesses. The flaws in Louisiana's analysis are obvious – (1) the 1500 feet channel width was, at best, "aspirational" and there is no evidence that such a channel was ever developed by April 1883;[20] (2) partial erosion, if it did in fact occur, is not the equivalent of total obliteration and, as the Special Master noted, even with the depicted sailing line boats could have passed close to Stack Island without all of the island being "washed away." [Final Report at 20] It should also be noted that the lunch map itself rejects the notion that Stack Island had "completely washed away" – the map reflects the placement of a government navigation light on the island, thus arresting any claim that the island had "disappeared." [*See* LA-SE-159-Orig.]

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[20] Mr. Winkley conceded that the sailing line depicted on the lunch map was about the same distance from Stack Island as the navigation course was from the Louisiana bank in his depiction on LA-SE-11. [*See* Winkley, 5 Sup. Tr. 34-39.] Accordingly, the hypothetical assumption of a 1500 feet wide channel is simply that – hypothetical – and has not held true under Louisiana's own analysis.

Not only does the lunch map fail to support the notion of an 1883 "disappearance," that notion is completely foreclosed by Exhibit P-SE-23, which is a hydrographic survey published by the Mississippi River Commission. Louisiana's own expert, Mr. Winkley, testified that, in his opinion, Exhibit P-SE-23 was more reliable than the lunch map. [*See* Winkley, 3 Sup. Tr. 232.] Exhibit P-SE-23 reflects hydrographic data for April 1883 and unequivocally depicts the continued existence of Stack Island. That exhibit completely negates Louisiana's theoretical analysis of the lunch map and emphatically rejects the notion that Stack Island had "disappeared" in 1883. Louisiana's own testimony reflects this as Mr. Winkley conceded on cross-examination that the entire island had not necessarily washed away. [*See* Winkley, 3 Sup. Tr. 246.]

Nothing is known about the circumstances under which the lunch map was prepared or used. Although it purports to reflect hydrographic information from the Mississippi River Commission, it was never published by the MRC. Furthermore, it is not known whether the map, if authentic, represents preliminary work or a finished product.[21] By contrast, Exhibit P-SE-23 is an official and final product of the Mississippi River Commission. It relates precisely to the time period by which Louisiana contends the island had "disappeared" and it clearly demonstrates that no such "disappearance" ever took place. Louisiana's theory in this regard should be rejected.

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[21] No explanation was given for how the document came into Mr. Mayeux's possession.

Finally, it should be noted that the Mississippi River Commission was in the midst of its extensive work in this area, and nothing in the MRC reports reflects that Stack Island ever "disappeared." Instead, in its description of the work done, the November 1883 MRC report confirms the continued existence of Stack Island:

> [T]his work showed good results, forcing the main channel of the river to the right [west] of the island and building a bar to the head of Stack Island, as shown by the high water survey of April 1883.

[Exhibit LA-18A at 425] If, as Louisiana contends, Stack Island had been obliterated in early 1883, the November 1883 MRC report would have reflected that fact and would certainly have read much differently. There simply is no basis for any claimed "disappearance" by 1883.

b. Louisiana's "true island" theory

The second theory developed by Louisiana in its effort to avoid the Island Rule should also be rejected. Louisiana contends that Stack Island did not constitute a "true island" and, therefore, did not implicate the Island Rule. A "true island," according to Louisiana, is an island whose elevation is greater than "top bank."[22]

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[22] This "true island" theory was variously formulated by Louisiana as requiring elevation above "ordinary high water" or "mean high water" or "top bank." Notwithstanding Louisiana's proposed definitions, Louisiana witness Winkley admitted that he could not define "ordinary high water" or "mean high water" and that neither the MRC, the Corps of Engineers, nor anyone else to his knowledge maintained data reflecting

Louisiana has conceded that, as patented, Stack Island's elevation exceeded "high bank." Accordingly, Louisiana apparently argues that the elevation of Stack Island periodically dropped below "true island" status and, therefore, that the Island Rule periodically ceased to apply. This "in again, out again" theory makes no sense and fails both on the law and on the facts. Such a litmus test for a "true island" has never been applied or even recognized in any Island Rule case, and it has no basis in law or in logic. Furthermore, as Louisiana's witnesses have conceded, the elevation of Stack Island did, in fact, exceed "top bank" elevation, and, therefore, the "true island" theory is simply beside the point.

The first answer to Louisiana's newly-devised theory is that Stack Island, in fact, had elevations exceeding "top bank." Louisiana's own witnesses conceded this. [*See* Winkley, 3 Sup. Tr. 63, 118-19; Mayeux, 4 Sup. Tr. 165-67.] The documentary exhibits in evidence also reflect

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"mean high water" or "ordinary high water." [*See* Winkley, 3 Sup. Tr. 120-28.] Top bank, therefore, was apparently substituted to avoid the absence of "definitional data," but "top bank" is, itself, problematic. Louisiana does not indicate what they would do in the rather common circumstance of one bankline being dozens of feet different in elevation from the other. Mr. Winkley also indicated that he had never seen anything defining islands in these terms until another Louisiana witness, again Mr. Mayeux, supplied him with such a definition. [*Id.* 239-40]

elevations satisfying Louisiana's "true island" requirement.[23] Accordingly, even under Louisiana's theory, which is not appropriate and has never been used in an Island Rule case, Stack Island qualifies as a "true island."

The second answer is that there is simply no legal support for Louisiana's "true island" theory. Without exception, the legal authorities referenced in Louisiana's Exceptions are inapposite – they have nothing to do with the definition of an island for purposes of applying the Island Rule and determining an interstate boundary. The "Submerged Lands Act," 43 U.S.C. § 1301, is completely unrelated to the Island Rule. *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10 (1935), dealt with a seaward boundary tidelands question and did not deal with the definition of an island for Island Rule purposes. *Texas v. Louisiana*, 410 U.S. 714 (1973), and *Scott v. Lattig*, 227 U.S.

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[23] *See, e.g.*, Exhibit P-12 (1882 MRC map) (Stack Island elevation is 110 feet plus; there are no bank elevations on the exhibit, but the top of the levee (which is situated on top of the bank) is shown as being between 115 and 120 feet); Exhibit P-18 (1913 map) (Stack Island elevation is 120 feet; top bank is shown at 110 to 115 feet); Exhibit P-19 (1925 map) (Stack Island elevation is 120 feet; top bank elevation is 110 feet); Exhibit P-20 (1930 map) (Stack Island elevation at 115 feet; top bank elevation at 105 to 110 feet); Exhibit P-24 (1937 map) (Stack Island elevation is 115 feet; top bank elevation is 115 feet); Exhibit LA-23 (1948 hydrographic survey) (Stack Island elevation is 40 feet; top bank is 35 feet) (a different elevation benchmark is used with this and subsequently-noted exhibits); Exhibit P-31 (1962 map) (Stack Island elevation is 50 feet; top bank elevation is 30 feet); Exhibit P-32 (1975 hydrographic survey) (Stack Island elevation is 40 feet plus; top bank elevation is 35 feet plus); Exhibit P-SE-40 (1988-89 hydrographic survey) (Stack Island elevation is 50 feet; top bank elevation is 35 feet).

229 (1913), are also silent on that issue. *Burford v. Sun Oil Co.*, 319 U.S. 316 (1943), relates to the district court's jurisdiction to enjoin administrative orders by the Texas Railroad Commission establishing well spacing requirements. It had nothing to do with islands, rivers, or elevations.

The island definition referenced by Louisiana with regard to LA-SE-122 appears to be a definition for use in connection with determining international boundaries and tidelands ownership. Given the ***daily*** ebb and flow of the tides, a "high water" definition in that context may be appropriate. However, such a definition has never been adopted for non-tidal islands and makes little sense in that context, particularly where the riparian owns to the low water mark (in Louisiana) or the bed of the river (Mississippi).

Louisiana urges a hyper-technical, surveyor-driven approach to the Island Rule. The Island Rule, however, has no such derivation or purpose. It is, instead, a common-sense doctrine born of the necessity to settle boundaries and titles. If Louisiana's approach were adopted as the rule, it would necessarily have the effect of upsetting long-established rights and expectations. It is neither necessary nor desirable in this proceeding to define an "island" for all purposes. It is particularly hazardous to borrow a definition sometimes utilized for one purpose and interject it into another context. Titles and boundaries, both public and private, tidelands areas, navigable and non-navigable streams, etc. could be implicated by such a rule.

As the Special Master noted, the only question properly at issue here is whether "Stack Island" was a land

mass sufficient to invoke application of the Island Rule. Respondents submit that the record clearly demonstrates that it was and is. Louisiana's second Island Rule avoidance theory – the so-called "true island" theory – should be rejected.

IV. STACK ISLAND HAS BEEN IN CONTINUOUS EXISTENCE AS A UNITARY ISLAND LANDFORM AND, THEREFORE, TRIGGERS THE ISLAND RULE

Louisiana employs one last device to avoid the implications of the Island Rule. In several places in its Exceptions, Louisiana makes the observation that "a mere moving mass of alluvial deposits" does not trigger the Island Rule. Louisiana then, again and again, describes Stack Island in those terms. Repetition, however, does not make it so. Stack Island has never been "a mere moving mass of alluvial deposits." Instead, Stack Island grew to the west by accretion and then diminished from the east by erosion. Contrary to Louisiana's mischaracterization, Stack Island has never been a collection of particles in suspension.

In connection with this argument, Louisiana cites *Carrick v. Lamar*, 116 U.S. 423 (1886). *Carrick* does not help Louisiana here. The holding of the Supreme Court is that the decision by the secretary of the interior was discretionary rather than ministerial and, therefore, that mandamus was properly refused by the lower court. There is no mention of – not even one word about – the Island

Rule.[24] Louisiana's resort to *St. Louis v. Rutz*, 138 U.S. 226 (1891), does not help Louisiana either. *Rutz* is a title case, not an Island Rule case or a boundary case, and it is governed by Illinois law.[25]

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[24] *Carrick* involved a request for a writ of mandamus directing the secretary of the interior to order a survey of Arsenal Island. Two successive U.S. secretaries of the interior had refused to order a survey. The former secretary of the interior had declined on the basis that (1) the island was still "drifting," thus making surveyed monuments "subject to immediate obliteration," (2) public works were underway to stabilize the island, and (3) the secretary was unsure whether the island was still subject to ownership by St. Louis as a result of a prior survey. 116 U.S. at 425. The current secretary of the interior had declined for the reason that the government was considering whether it wanted to make use of the island in its on-going public works project as opposed to placing it in the public domain. *Id.* The Supreme Court stated that all the reasons given (including the quandary regarding ownership) constituted matters of discretion and, therefore, that a writ of mandamus was properly refused. *Id.* at 426.

[25] In *Rutz*, the dispute principally centered on title to accretions to the bed of the river that subsequently joined to Arsenal or Quarantine Island. The trial court had found, as a matter of fact, that the accretions had formed on the bed of the river *on the Illinois side of the bed* and, therefore, were owned, under Illinois law, by the Illinois riparian. 138 U.S. at 247. Under those factual circumstances, the Court held that the subsequent joinder of the bed accretions to the island did not divest the Illinois riparians of their title. *Id.* at 251.

The language quoted by Louisiana from the *Rutz* opinion is actually a quote from the former interior secretary's rationale in *Carrick* and cannot, in any sense, be construed as a holding that the Island Rule does not apply under the circumstances present here.

The circumstances in the present case bear no resemblance to those described in *Carrick* and *Rutz*. Here, Stack Island grew substantially by accretions to the west side of the island[26] and subsequently eroded on the east side. The painstaking map-by-map analysis conducted before the Special Master proved the continuous existence of Stack Island as an identifiable island feature from 1881 through the present. Contrary to Louisiana's repeated suggestion, there was no "mere moving mass of alluvial deposits."

Using overlays and a light table (to permit the image from Stack Island on the later map to be overlaid on and compared to the image of Stack Island on the earlier map), Respondents' counsel demonstrated, through Louisiana's own expert witness, that Stack Island has continuously existed, in a unitary identifiable landmass, from the time of the patent to the present day. The overlays were made to identical scales (1 to 20,000) and were lined up by latitude/longitude coordinates. The overlays were then reviewed and discussed, comparing the portion of Stack Island shown on the 1882 map (P-13) with Stack Island as it was reflected in subsequent maps. The results of that comparison, which traces Stack Island from 1882 (shortly after the patent survey) through 1937 (when the transition period was largely complete), are summarized below.

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[26] Louisiana witness Winkley conceded that Exhibit LA-SE-11 demonstrated that the western accretions to Stack Island extended into what had been Louisiana ten years before. [*See* Winkley, 3 Sup. Tr. 233-34.]

maps compared	comments
P-13 (1882) P-17 (1908)	90% of 1882 island still remains in place on 1908 map (3 Sup. Tr. 149)
P-13 (1882) P-18 (1913)	70-80% of 1882 island still remains in place on 1913 map (3 Sup. Tr. 151)
P-13 (1882) P-19 (1925)	90+% of 1882 island still remains in place on 1925 map (3 Sup. Tr. 152)
P-13 (1882) P-20 (1930)	75% of 1882 island still remains in place on 1930 map (3 Sup. Tr. 154)
P-13 (1882) P-24 (1937)	65% of 1882 island still remains in place on 1937 map (3 Sup. Tr. 159)

[*See generally* Winkley, 3 Sup. Tr. 148-59.][27]

The foregoing reflects that, contrary to the mischaracterization of Louisiana, Stack Island was an island of substantial permanence and not "an agglomeration of shoals and bars." To be sure, accretion and erosion had operated on the island, as they do on all riparian features. But throughout the entire period, Stack Island clearly had sufficient permanence, stands of timber and other vegetation, elevation, etc. to implicate the Island Rule, and Louisiana has failed to provide a single case that indicates to the contrary. Accordingly, Louisiana's attempt to evade the Island Rule should be rejected.

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[27] The exhibits used were overlays made from the exhibits referenced textually. The actual overlays have the prefix "P-SE-50-" in addition to the numbers set out above. *E.g.* the 1882 overlay shown as "P-13" is actually "P-SE-50-P-13."

V. LOUISIANA CANNOT SUPPORT ITS CLAIM TO TITLE, AND ITS ATTEMPT TO CANCEL THE HOUSTON GROUP'S TITLE SHOULD BE DENIED

In his Final Report, the Special Master recommended that the Court deny Louisiana's request that the Houston Group's title to Stack Island be cancelled. Louisiana did not file any exceptions to the Special Master's findings or recommendations in that regard.

The Houston Group's title can be traced directly from a federal land patent issued by the United States to Stephen B. Blackwell in 1888 (effective 1881). The Houston Group also holds under a 1933 tax foreclosure deed from the State of Mississippi.[28] Thus, for upwards of a 100 years, the Houston Group and its predecessors have claimed legal title to Stack Island.[29]

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[28] This title is derived through instruments known as "forfeited tax patents." As a result of unpaid tax levies, the State of Mississippi acquired title to Stack Island. That title was subsequently conveyed to the Houston Group's predecessor in title – the Blackwell family. Accordingly, the Blackwell family (and the Houston Group) hold under the federal land patent issued by the United States government and under the tax instruments issued by the State of Mississippi.

[29] The record also shows that the Houston Group, its predecessors, and their respective tenants have occupied and used the Disputed Area to the exclusion of others for many years. In *Houston v. United States Gypsum Co., supra*, the Houston Group obtained a judgment from the federal court in Mississippi, affirmed by the Fifth Circuit, to the effect that the Houston Group has acquired title (by adverse possession) to that portion of the island that encroached upon lands held by Mississippi riparian owners.

In its briefing before the Special Master, Louisiana attempted to attack the validity of the federal land patent. Judge McKusick, however, properly determined that such a challenge is time-barred.

> This challenge should be rejected both on the ground that federal land patents enjoy a presumption of validity and on the ground that the attack, which comes 106 years after the issuance of the patent and 177 years after Mississippi statehood, is time-barred on a laches principle.

[Final Report at 30 (citations omitted)]

Even setting aside, for the moment, the issue of laches, Louisiana's attack itself is substantively flawed. Louisiana argued that Stack Island was not in the federal public domain but belonged to Mississippi and, therefore, that the federal government had no title to transfer by patent.[30] To that end, Louisiana argued that the government surveyor "simply failed to do proper analysis of map materials," that he "should have concluded" that Island No. 94 "was not in existence at the time of sovereignty of either state," and that "it was attached to the

[30] The premise of this argument is Louisiana's contention that Stack Island "disappeared" in 1811. Louisiana provided little detail in support of this assertion and fails to address the evidence detailed in Respondents' Joint Trial Brief to the effect that the island was in existence on the Mississippi side of the boundary thalweg prior to Mississippi's statehood in 1817. Accordingly, even if the pre-1812 island did "wash away," which is not proven, the evidence indicates that Stack Island was in existence prior to Mississippi's sovereignty. Consequently, the United States would have retained title to the island, which was then transferred to the Houston Group's predecessor in title by federal land patent.

Mississippi land mass as a bar formation and not an island just a few years prior to survey." [Louisiana Brief at 12, 13][31] Louisiana speculates as to what went on in the mind of the deputy surveyor more than 100 years ago and says that the deputy surveyor "made several errors." [Louisiana Brief at 16]

This speculation regarding what the surveyor did or did not know, or should or should not have done, is precluded by the Supreme Court's decision in *St. Louis Smelting & Refining Co. v. Kemp*, 104 U.S. (14 Otto) 633 (1882). There, the Court held that the issuance of the patent was conclusive with regard to the facts implicit in the decision to issue the patent. The Court reasoned that the decision made by United States officials charged with responsibility for the issuance of patents was analogous to a judgment of a court having jurisdiction. Treating the issuing decision in that fashion precludes the type of argument that Louisiana makes here. A court has authority to determine facts that vest it with jurisdiction; the land department officials have the same authority. But even if they did not, the day for an attack on their factual determination of the factual underpinnings of their action has long since passed.

The patent to Stephen B. Blackwell is presumptively valid. Even if Louisiana were permitted to go behind the factual underpinnings of the patent under the *St. Louis Smelting & Refining Co. v. Kemp* doctrine, it was Louisiana's burden to establish facts that would render the

[31] Even if this were true, Louisiana has never been able to explain how land "attached to the Mississippi land mass" ever becomes Louisiana land.

patent invalid, which Louisiana failed to do. Louisiana had an immense, if not impossible, burden of establishing that the land department officials erred in their factual determinations, and, in point of fact, not even Louisiana contends that it has proved the speculative inferences it draws with respect to the thinking of the deputy land surveyor regarding the issuance of the patent. Even if Louisiana could properly, at this late date, challenge a federal patent, Louisiana failed to provide any evidence that would support such a challenge.[32]

Louisiana's attack on the federal patent to Blackwell fails to account for two very important matters regarding the title issue. First, regardless of the federal patent (which Respondents maintain is valid), the Houston Group also traces its title to the State of Mississippi – independent of the federal land patent to Blackwell. Louisiana's attack is directed at showing that the United States did not have title to convey. Louisiana does nothing to negate title acquired through the State of Mississippi.

The second omission on Louisiana's part is equally compelling – Louisiana's brief is conspicuously silent regarding how Louisiana is supposed to have acquired title. It is again worth noting that Louisiana has conceded that Stack Island, prior to the patent, was located within Mississippi's boundaries. In the face of this, the absence

[32] Even the United States is barred by limitations from attacking a patent after six years. 43 U.S.C. § 1166 (1986).

of any attempt on Louisiana's part to explain and support its claim of title is a telling omission.[33]

VI. THE DISPUTED AREA CONSTITUTES MISSISSIPPI LAND UNDER THE RULE OF ACQUIESCENCE

In his Final Report, the Special Master did not make any specific findings or recommendations regarding the parties' claims under the Rule of Acquiescence. Perhaps the reason for this may be found in the fact that Louisiana's position in this regard is wholly dependent on its theory that Stack Island "disappeared." Regardless, Respondents' position on acquiescence is set forth below.

The Rule of Acquiescence is well-settled. In applicable cases, it displaces the Rule of the Thalweg and controls the determination of an interstate boundary. The Rule of Acquiescence, sometimes called the Rule of Prescription and Acquiescence, holds that a state acquires or establishes sovereignty with regard to particular land when the state has asserted long and continuous jurisdiction and authority over that land with the acquiescence of another state or states. *Vermont v. New Hampshire*, 289 U.S. 593, 616 (1933); *Virginia v. Tennessee*, 148 U.S. 503, 510

[33] Louisiana is a "stranger to the patent" and, therefore, has no standing to level a challenge thereto. Furthermore, to the extent that Louisiana purports to assert title as a result of quit claim deeds from Louisiana riparians, they too are strangers to the patent and are without standing. It is worth noting that some of the hunting leases and quit claim deeds touted by Louisiana reference the Austin Smith line. [*See, e.g.* Mr. House's quit claim deed, Exhibit P-SE-44.]

(1893); *Indiana v. Kentucky*, 136 U.S. 479 (1890); *Oklahoma v. Texas*, 272 U.S. 21, 47 (1926); *Arkansas v. Tennessee*, 310 U.S. 563, 569, 571 (1940); *Georgia v. South Carolina*, 497 U.S. 376, 389-93 (1990); *Illinois v. Kentucky*, 500 U.S. 380, 384 (1991) (recognizing the rule but holding it not applicable under the facts).[34] The Rule of Acquiescence has been applied in boundary controversies between Louisiana and Mississippi. *Louisiana v. Mississippi*, 202 U.S. 1 (1906).

a. Factors to be considered under the Rule of Acquiescence

The application of the Rule of Acquiescence is purely a question of fact. *Arkansas v. Tennessee*, 310 U.S. at 567 (exercise of jurisdiction and dominion and acquiescence characterized as "that question of fact"). And, the Supreme Court has identified various facts and events to be considered as evidence of the exercise of sovereignty, dominion, and control.

1. Unchallenged patents issued by the United States showing property to be in a particular state are probative of a claim of sovereignty and acquiescence. *Louisiana v. Mississippi*, 202 U.S. at 55-56.

2. The assessment and collection of taxes over a long period of time are evidence of the exercise of sovereignty and control. *Arkansas v. Tennessee*, 310 U.S. at

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[34] As with other rules dealing with sovereignty and boundary law, the underlying rationale is similar to the rules applicable to private rights.

567-68; *Vermont v. New Hampshire*, 289 U.S. at 616; *Louisiana v. Mississippi*, 202 U.S. at 55; *Virginia v. Tennessee*, 148 U.S. at 510.

3. The exercise of criminal and civil jurisdiction by the courts of a state are treated as acts of sovereignty. *Indiana v. Kentucky*, 136 U.S. at 518-19.

4. Township surveys prepared by the United States General Land Office have been regarded as evidence of the exercise of jurisdiction and sovereignty. *Indiana v. Kentucky*, 136 U.S. at 512-14; *Louisiana v. Mississippi*, 202 U.S. at 53.

5. Grants by the state to individuals have been treated as acts of sovereignty. *Indiana v. Kentucky*, 136 U.S. at 516-18; *Louisiana v. Mississippi*, 202 U.S. at 52-53.

6. Acts and recognitions of state officials and individuals that tend to show in which state the land is located have been regarded as indicative of the exercise of sovereignty. *Louisiana v. Mississippi*, 202 U.S. at 56; *Arkansas v. Tennessee*, 310 U.S. at 565-68; *Oklahoma v. Texas*, 260 U.S. 606 (1923).

7. The general reputation and treatment by private citizens is also relevant to the application of the doctrine. *Arkansas v. Tennessee*, 310 U.S. at 567; *Oklahoma v. Texas*, 260 U.S. at 635-36.[35]

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[35] The fascinating article in the *Vicksburg Sentinel* of June 1847 regarding the execution of Ben Vincent, while admittedly remote and legendary, is nevertheless relevant. It shows, if true, that the Indian residents of Stack Island regarded the island as being subject to Mississippi criminal laws. This confirms the

8. Occupancy, cultivation, and other use is not only evidence of a claim of ownership but also of the title under which the possession is held and the ownership claimed. *Georgia v. South Carolina*, 497 U.S. at 393; *Landes v. Brandt*, 51 U.S. (10 How.) 348, 375 (1850).

9. Inaction by a state may itself constitute acquiescence. *Georgia v. South Carolina*, 497 U.S. at 393 ("[I]naction alone may constitute acquiescence when it continues for a sufficiently long period. See *Rhode Island v. Massachusetts*, 15 Pet. 233, 274 (1841); *Vermont v. New Hampshire*, 289 U.S. at 616 (1933).").

b. Respondents' record evidence relating to the Rule of Acquiescence

As indicated above, there are various factors to consider under the Rule of Acquiescence. Respondents submit that the record evidence, considered in light of those factors, demonstrates that the Disputed Area constitutes Mississippi land.

Unchallenged Patents Stack Island was patented as land located in Issaquena County, Mississippi. It may reasonably be concluded from this that both the officials of the United States and the patent applicant regarded the land as being located in Mississippi. Prior to its intervention in *Houston v. Thomas* in 1987, Louisiana had taken no action to contest Mississippi's sovereignty or challenge

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interpretation of and conclusions arising from the 1826-1827 township maps showing Island No. 94 within the boundaries of Mississippi. [Exhibit P-1]

the Houston Group's title. [*See* Exhibits P-6, P-7, P-41, and P-SE-20.]

Taxes The record shows that as early as 1889, the year following the Blackwell patent, and continuously thereafter, taxes have been assessed by and paid to Issaquena County, Mississippi with regard to the Disputed Area. In evidence as Exhibit P-64 is an affidavit of the Issaquena County Chancery Clerk regarding the assessment and payment of taxes during this 100 year period, together with copies of available assessment rolls and tax receipts. In 1929, Mississippi enforced its tax laws through foreclosure and conveyed the island to the predecessor of the Houston Group in 1933. [*See* Exhibit P-46.] Mississippi has continued to assess taxes on the Disputed Area, and the Houston Group has continued to pay taxes on the Disputed Area.

Exercise of Civil and Criminal Court Jurisdiction Both state and federal courts in Mississippi have exercised jurisdiction over controversies involving the Disputed Area. Exhibit P-60 is a copy of the final judgment rendered in the United States District Court for the Southern District of Mississippi in the case of *Houston v. United States Gypsum Co.* in August 1979. This judgment is the subject of separate opinions reported by the Fifth Circuit. *See, e.g., Houston v. United States Gypsum Co.*, 569 F.2d 880 (5th Cir. 1978), *appeal after remand*, 652 F.2d 467 (1981).[36] There are numerous other examples of

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[36] It is not contended that Louisiana is bound by the Fifth Circuit's decision in *Houston v. United States Gypsum Co.*, 569 F.2d 880 (5th Cir. 1978). The decision, however, is evidence of the general recognition of the island as Mississippi land, as well

Mississippi-based courts exercising jurisdiction over the Disputed Area. [*See* Exhibits P-53, P-58, and P-65.][37] There is no evidence in the record of any Louisiana court having undertaken to exercise any jurisdiction over any litigation regarding the Disputed Area.

Township Surveys The 1826-27 United States General Land Office township survey [Exhibit P-1] clearly identifies a land mass located near the Mississippi mainland as Stack Island. The field notes to this early survey by the United States Surveyor clearly refer to the foot of Stack Island as the survey is being made along the Mississippi shore. [Exhibit P-SE-7] The 1828-1829 United States General Land Office survey map, reflecting what is now East Carroll Parish, Louisiana, does not show Stack Island or

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as an example of the exercise of jurisdiction by Mississippi-situated courts. The payment of taxes to Mississippi authorities over a long period of time is specifically mentioned. 569 F.2d at 885. The opinion in that case provides a touch of irony worth noting: "We begin with 'Stack Island' in the Mississippi River, *so identified in the original 1826 United States Land Survey* (platted as 'Island No. 94' by the government in 1881)." 569 F.2d at 881 (emphasis added). Specifically addressing an issue present here, the Fifth Circuit observed, "An avulsion does not change the boundary. Hence, *all the territory involved in this controversy is in Issaquena County, Mississippi*, even though Stack Island is now west of the main channel of the Mississippi River." 569 F.2d at 881 n.2 (emphasis added). Louisiana did not raise any question with respect to this conclusion. It did not advise Mississippi that it regarded this observation of the Fifth Circuit as being incorrect. Instead, Louisiana maintained its long-continued silence until its intervention in *Houston v. Thomas*.

[37] *See also* the testimony of Bill Marshall contained in the transcript of the testimony before the district court, pages 226 through 229.

any other islands along the Louisiana shore. [*See* Exhibit P-2.]

Acts and Recognitions of State Officials and Others As early as 1827, individuals in the area considered Stack Island as part of Mississippi. [*See* Exhibit P-SE-8, 1847 edition of *Vicksburg Weekly Sentinel*.] This ancient newspaper article published in 1847 regarding an 1827 event tends to show that the Indian residents of Stack Island regarded the island as being subject to the jurisdiction of Mississippi. In 1881, Stephen B. Blackwell made application for a homestead patent from the United States of America. [*See* Exhibit P-SE-41.] This file shows that, in at least 1881, the general reputation was that Stack Island was part of Mississippi.

One of the most conclusive indications that Louisiana did not consider Stack Island to be within its jurisdiction is found in the 1907 island survey by the Fifth Louisiana Levee District. That survey did not include Stack Island among the islands surveyed and claimed by Louisiana. The 1907 survey is Exhibit LA-37-A1 and is referred to in *State ex rel. Board of Commissioners for the Fifth Louisiana Levee District v. Capedeville*, 54 So. 820 (La. 1911). A comparison of Exhibit LA-37-A1 (the 1907 survey) and P-17 (a 1908-1909 survey of the Mississippi River Commission) reflects that Stack Island was not among the islands surveyed and claimed by Louisiana.[38]

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[38] The survey was undertaken pursuant to Act No. 44 of 1886 of the Louisiana legislature, by which Louisiana granted to the Fifth Louisiana Levee District "all lands embraced in the original grants by Congress for levee and drainage purposes that are located in the parishes of the Fifth Louisiana Levee

Exhibit P-98 confirms that Louisiana did not claim jurisdiction over Stack Island at that time. In Exhibit P-98, the Louisiana Registrar of the State Land Office made reference to all islands claimed by the Fifth Louisiana Levee District that were to be surveyed and indicated that the Levee District would request a patent to be issued with regard to the islands claimed by Louisiana. No claim was made to Stack Island.

In the 1970's, the Lake Providence Port Commission investigated its claim to Stack Island and determined that it had no claim to or interest in the "accretion area lying along the Louisiana shore immediately south of Stack Island." [*See* Exhibits P-83 and P-112.] During this same period of time, the Louisiana Department of Public Works investigated Louisiana's potential claim to the Disputed

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District and are subject to overflows" and also all lands forfeited or sold to the state for taxes. In 1908, by Act No. 191, the legislature amended the granting clause of Act No. 44 of 1886 by adding the following words: "also, all other lands situated in said district belonging to the State of Louisiana be and the same are hereby granted to said Board of Commissioners, provided this Act shall not apply to internal improvement lands or any lands reserved to the State for school purposes." *State ex rel. Board of Commissioners for the Fifth Louisiana Levee District v. Capedeville*, states:

> As the records show that, in the year 1907, the said islands were surveyed by the State Board of Engineers at the expense of the Levee District, it is probable that Act No. 191 of 1908 was passed for the purpose of vesting title to these lands in the plaintiff board. The grant in said Act is broad enough to cover said islands, unless they fall within the exception of lands reserved to the State for school purposes.

Area but never asserted any claim. [*See* Exhibits P-80 through P-84, P-87, P-88, P-90, P-91, and P-92.]

The stipulated record contains evidence that officials of Issaquena County, Mississippi have asserted criminal jurisdiction. By contrast, persons charged with game violations have been delivered by Louisiana officials to Mississippi officials for prosecution. Louisiana State Police, in carrying out reconnaissance operations for marijuana patches on Stack Island, have not attempted to exercise jurisdiction but, rather, have notified the Mississippi Bureau of Narcotics of such findings and left it to Mississippi to issue appropriate search warrants and take enforcement action. Louisiana authorities, having arrested suspects on the island, turned such suspects over to Mississippi Bureau of Narcotics agents, and such suspects were prosecuted in Mississippi by Mississippi officials. [*See* P-65; Tr. 213-15, 218; Bill Marshall's testimony at Tr. 226-29.] Louisiana officials have declined to exercise jurisdiction on the island. [J.A. 78, 82-84, 86][39]

Reputation and Treatment by Private Citizens In addition to the recognition by public officials that Stack Island was within Mississippi, the record reflects substantial proof from private individuals in the area that supports the fact that Stack Island is located in

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[39] There are numerous deeds, other evidences of ownership, and recognitions of individuals and state officers concerning the ownership of Stack Island. In 1933, the State of Mississippi conveyed by forfeited tax patent all of Stack Island to the Houston Group's predecessor in title. [Exhibit P-46] [*See also* Exhibits P-40 through P-66 and Exhibit P-SE-20 (which is the United States General Land Office file obtained from the National Archives).]

Mississippi.[40] The record, while not undisputed in this regard, shows that private citizens have for many years regarded the Disputed Area as Mississippi land and have understood it to be within the State of Mississippi.

Inaction by Louisiana Louisiana was on notice of Mississippi's claim to Stack Island by, *inter alia*, the 1826-1827 and 1828-1829 United States township surveys, the 1881 Department of Interior General Land Office map showing Island No. 94 in Mississippi, the 1881 Stephen Blackwell patent application, the 1888 patent by the United States to Stephen Blackwell of Island No. 94 as Mississippi lands, the 1933 deed from Mississippi to the Houston Group, the Fifth Circuit litigation in 1976 (*Houston v. United States Gypsum, supra*), and the possession of the various claimants, including the Houston Group, extending over a period of more than 100 years. *See Georgia v. South Carolina, supra* (events putting Georgia on notice of South Carolina's exercise of sovereignty). These events include use and occupancy by individual claimants. The Court cited the early case of *Landes v. Brandt*, 51 U.S. (10 How.) 348, 375 (1850), for the rule that cultivation, taxation, and possession constitute notice not only of the possession itself but of title under which the possession is held.

> "It is conclusively settled in England, that open and notorious adverse possession is evidence of notice; not of the adverse holding only, but of the title under which the possession is held. . . . And in the United States we deem it to be

[40] *See* Tr. 46, 81, 97, 137 through 138, 144 through 146, 226 through 229, 242 through 243, 250, and 252.

> equally settled." *Landes v. Brandt*, 10 How. 348, 375 (1851).

497 U.S. at 393. Louisiana asserted no claim to Stack Island until the filing of its Third Party Complaint against Mississippi in *Houston v. Thomas*.

c. Except to argue its "disappearing island" theory, Louisiana effectively conceded acquiescence

In its briefing before the Special Master, Louisiana's only answer to the acts of acquiescence detailed above was simply to argue that the Disputed Area was not around until the 1950's. Louisiana's position and representations regarding acquiescence – *i.e.* the Disputed Area did not exist until the 1950's – have some curious inconsistencies. At page 31 of its brief before the Special Master, Louisiana asserts that the Delony family "has lived on the property since before the turn of the century." Similarly, at page 32, Louisiana asserts that Mr. Wyly has been "hunting and fishing, swimming, etc." on the accreted area "commencing sixty (60) years ago." Louisiana does not explain how the Delony family or Mr. Wyly could do this since – according to Louisiana – the Disputed Area did not even come into existence until several decades later. The answer, of course, is that neither the Delony family nor Mr. Wyly had anything to do with the Disputed Area; their activities took place elsewhere.[41]

[41] This is confirmed by Louisiana's careful use of vague terms such as "property," "accreted area," etc., rather than the defined term "Disputed Area."

Louisiana has no answer to the acts of acquiescence detailed by Respondents. The conduct proffered by Louisiana in support of its purported involvement with the Disputed Area occurred in the recent past, long after acquiescence. Accordingly, Respondents submit that, under the Rule of Acquiescence, as well as under the Rule of the Thalweg and the Island Rule, the Disputed Area constitutes Mississippi land.

RESPONSE TO REQUEST FOR NEW TRIAL

In its Exceptions, Louisiana has requested a new trial of the supplemental hearing before the Special Master.[42] However, Louisiana has not offered a single reason why a new trial is necessary or even helpful. Accordingly, it is respectfully submitted that Louisiana's request to start over yet another time should be denied.

CONCLUSION

For the foregoing reasons, Mississippi and the Houston Group request that the recommendations of the Special Master be approved and adopted; that the interstate boundary in the vicinity of the Disputed Area be established as set out in Appendix A to the Final Report

[42] At page 29 of its Exceptions, Louisiana makes reference to Fed. R. Civ. P. 52 and the clearly erroneous standard. Respondents do not believe that, in the context of an original action, this Court's review of the Special Master's recommendations is subject to Rule 52.

of the Special Master; and that Louisiana's prayer for cancellation of the Houston Group's title be denied. Respondents request that the decree set out in Appendix E be entered as the judgment of this Court.

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